

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

www.montgomerycountymd.gov/content/council/boa/index.asp

(240) 777-6600

Case No. S-2816

**PETITION OF T-MOBILE NORTHEAST, LLC
AND RALPH AND MARGARET GIBSON**

RESOLUTION TO DENY REQUEST FOR RECONSIDERATION

(Resolution Adopted June 6, 2012)

(Effective Date of Resolution: July 12, 2012)

The Board of Appeals has received a letter, dated May 21, 2012, from Edward L. Donohue, Esquire, on behalf of T-Mobile Northeast, LLC. The Board of Appeals granted Case No. S-2816, on May 4, 2012, to allow the construction and operation of a telecommunication facility under Section 59-G-2.58 of the Zoning Ordinance. Mr. Donohue requests reconsideration and elimination of Condition 10 from that opinion. As grounds for the request Mr. Donohue cites Section 6409 of The Middle Class Tax Relief and Job Creation Act of 2012, known also as House Bill 3630, which states:

“Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station (H.R. 3630 § 6409(a)(1).)”

Mr. Donohue appeared at the Board’s June 6, 2012 Worksession and argued that passage of the bill after the Board’s decision constitutes a changed circumstance under Rule 10.1.2 of the Board’s Rules of Procedure [Resolution Numbers 12-865 (Adopted October 27, 1992), 14-742 (Adopted January 30, 2001) and 15-554 (Adopted March 23, 2004)].

Mr. Donohue points out that §6409(a)(2) of H.R. 3630 defines “eligible facilities request” as:

“any request for modification of an existing wireless tower or base station that involves –

- (A) co-location of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.”

Mr. Donohue opines that House Bill 3630, §6409 preempts the enforcement of Condition 10 and “unmistakably prevents a local jurisdiction from imposing such qualifying requirements as contained in Condition 10.”

The subject property is Lot P161, located at 2815 Cabin Creek Drive, Burtonsville, Maryland, 20866, in the R-200 Zone.

The Board of Appeals considered Mr. Donohue’s request at its Worksession on June 6, 2012. Condition 10 of the Board’s May 4, 2012 opinion granting the special exception states:

“The facility shall be available for co-location of up to three carriers, however, before any co-location occurs, Petitioners must file an administrative modification request so that the level of potential imposition on the community can be reviewed and any appropriate conditions imposed. If the administrative modification request is granted, Zoning Ordinance §59-G-1.3(c)(1) provides for notification to all parties entitled to notice at the time of the original special exception filing, as well as current adjoining and confronting property owners, giving interested parties an opportunity to request a hearing.”

The Board finds that §6409(a)(2) of H.R. 3630 was actually signed in February, 2012, prior to the Board’s decision in Case No. S-2816, so its passage does not constitute a changed circumstance with respect to the Board’s decision, and Mr. Donohue could, as Rule 10.1.2 requires, reasonably have presented this information to the Board before it made its decision. The Board further finds, that substantively, the intent of Condition 10, to allow the Board to impose conditions with the modification of a telecommunication facility special exception, is not inconsistent with the requirements of §6409(a)(2) of H.R. 3630. The Board further finds that there is no “eligible facilities request” as contemplated by House Bill 3630, §6409 before it to decide, so the question of its applicability to this case is hypothetical. Therefore, on a motion by David K. Perdue, Vice-Chair, seconded by Catherine G. Titus, Chair, with Carolyn J. Shawaker and Stanley B. Boyd in agreement and Walter S. Booth necessarily not participating:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the request for reconsideration is **denied**.

Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 12th day of July, 2012.

Katherine Freeman
Executive Director

NOTE:

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

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Case No. S-2816

**PETITION OF T-MOBILE NORTHEAST, LLC
AND RALPH AND MARGARET GIBSON**

OPINION OF THE BOARD

(Opinion Adopted April 25, 2012)

(Effective Date of Opinion: May 4, 2012)

Case No. S-2816 is an application under Section 59-G-2.58 of the Zoning Ordinance to allow the construction and operation of a telecommunication facility. The Hearing Examiner for Montgomery County held a hearing on the application on February 25, 2012, closed the record in the case on March 14, 2012, and on April 13, 2012, issued a Report and Recommendation for approval of the special exception.

The subject property is Lot P161, located at 2815 Cabin Creek Drive, Burtonsville, Maryland, 20866, in the R-200 Zone.

Decision of the Board: Special Exception **Granted** Subject to
The Conditions Enumerated Below.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on April 25, 2012. The Board also had before it timely requests for oral argument from Jeff Coles and Stewart Saphier. On a motion by Carolyn J. Shawaker, seconded by Stanley B. Boyd, with Catherine G. Titus, Chair, in agreement, David K. Perdue, Vice-Chair, not in agreement, and Walter S. Booth necessarily absent, the Board found that the Hearing Examiner comprehensively analyzed the issues raised in the requests for oral argument, and voted to deny the requests.

After careful consideration and review of the record, the Board revised Condition 5, adopts the Report and Recommendation with that amendment, and grants the special exception subject to the following conditions:

1. The Petitioners shall be bound by all of the exhibits of record, and by the testimony of their witnesses and the representations of counsel to the extent that such testimony and evidence are identified in the Hearing Examiner's report and in this opinion.
2. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Petitioners must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.
3. The Petitioners must paint the concealment pole brown, consistent with the color swatch "SW6089-Grounded," attached to Exhibit 71(d)), so that it will better blend in with its surroundings.
4. The Petitioners must maintain imperviousness below eight percent and protect the on-site environmental buffers, in accordance with the approved Water Quality Plan (Exhibit 75(a)).
5. Telecommunications service providers using this site must have legal access to the site via Cabin Creek Drive before this special exception may be implemented. No access will be permitted from Miles Road for environmental reasons. The Board of Appeals does not decide the legal dispute between the parties regarding the respective rights of the parties to a recorded easement for access to the site..
6. The telecommunication facility must display a contact information sign, no larger than two square feet, affixed to the outside of the equipment enclosure. This sign must identify the owner and the maintenance service provider and provide the telephone number of a person to contact regarding the installation. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.
7. There must be no antenna lights or stroboscopic lights unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.
8. There must be no outdoor storage of equipment, except equipment specified in the Site Plan, and all equipment must be enclosed in the 8-foot tall compound fence.
9. Each owner of the telecommunications facility is responsible for maintaining the facility in a safe condition.
10. The facility shall be available for co-location of up to three carriers; however, before any co-location occurs, Petitioners must file an administrative modification request so that the level of potential imposition on the community can be reviewed and any appropriate conditions imposed. If the administrative

modification request is granted, Zoning Ordinance §59-G-1.3(c)(1) provides for notification to all parties entitled to notice at the time of the original special exception filing, as well as current adjoining and confronting property owners, giving interested parties an opportunity to request a hearing.

11. The telecommunications facility and all impervious surfaces constructed as part of this approval must be removed at the cost to the owner of the telecommunications facility when the facility is no longer in use by any telecommunications carrier for more than 12 months.
12. Petitioners must obtain a Hazmat Use Permit for the subject site before commencing operations.
13. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and the entire premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

On a motion by Catherine G. Titus, Chair, seconded by Stanley B. Boyd, with Carolyn J. Shawaker and David K. Perdue, Vice-Chair, in agreement and Walter S. Booth necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 4th day of May, 2012.

Katherine Freeman
Executive Director

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.